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In The
Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

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Herman R. Slakman, petitioner, pursuant to Rule 58 of the Rules of this Court, petitions the Court to grant a rehearing upon its order denying certiorari, entered November 9, 1970, and, in support of his petition, urges the following substantial ground which is available to petitioner although not previously presented:

Petitioner was deprived by the State of the effective assistance of counsel and of due process of law, in contravention of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, by the action of investigators utilized by the State in arranging for the display of and displaying petitioner's photograph for identification purposes to the State's principal witness, in the absence of petitioner's counsel, after petitioner had been charged and was awaiting trial.

In support of his petition, petitioner shows:

1. In March 1968, petitioner was tried and convicted of the offense of arson. On direct examination by the Assistant County Solicitor, the witness Lawrence Posey, over objection, was asked to and did purportedly identify petitioner in the courtroom as the person who Posey said admitted him to the H & S Store on June 30, 1966, when Posey testified he set fire to the building. On redirect examination the Assistant County Solicitor elicited from Posey the testimony, then unknown and unanticipated by petitioner's counsel, that he, Posey, had recognized a photograph of petitioner which Posey said was exhibited to him by John J. Savage "three or four months ago, I guess" (trial transcript, p. 265). Petitioner's motion to strike the identification testimony of Posey from consideration by the jury was denied by the trial court. The exhibition of petitioner's photograph to Posey "three or four months" prior to petitioner's trial in March 1968, long after he had been charged in February 1967 (Tr. 1) and released on bond. The display was arranged and carried out in the Tampa police station, in the presence of Tampa police (Tr. 90), and in the absence of petitioner's counsel.

2. On June 18, 1968, Posey gave a sworn, transcribed statement in the presence of petitioner's counsel and counsel for other defendants, in which he stated:

"BY MR. SMITH:

"Q Did you know Mr. Slakman by sight at any time up until the time you identified him in this trial here before Judge Langston?

"A No, sir.

"Q Had you ever seen him before, to your knowledge?

"A No, sir.

"Q You had never seen him before, to your knowledge, prior to the day you testified here in March of 1968?

"A No, sir. The reason that I knew him then, well, I had seen pictures of him before -- before he went to trial.

"Q And where had you seen those pictures?

"A In Dallianno's office [at the Tampa police department].

"Q And who showed them to you?

"A Well, it was Sergeant Dallianno and Mr. Savage.

"Q Is that John Savage?

"A Yes, sir.

"Q And how many occasions did they show you photographs of Mr. Slakman?

"A Well, I had seen them a couple of times.

"Q But did you give a description to Sergeant Dallianno or to Mr. Savage or to both of them of the person who you said admitted you to the store?

"A I did give a description. Of course, about anybody would have fit the description that I gave because I didn't give a very clear description of him until after I seen his pictures I knew what he looked like."

Tr. 90, 92

3. As the record in this case shows, petitioner presented the transcript of Posey's statement to the trial court and requested the court's consideration of the transcript on the question of whether Posey's said testimony required a new trial (Tr. 82). The trial court nevertheless imposed judgment and an imprisonment sentence on petitioner on June 19, 1968 (Tr. 92) whereupon he appealed (Tr. 93). Thereafter, and before the Florida appellate court considered the merits of the appeal, petitioner requested of that court by appropriate motion that the case be temporarily remanded to the trial court for a determination of whether the contents of Posey's testimony of June 18, 1968, required that petitioner be granted a new trial. The Florida appellate court denied petitioner's motion. That court later declined to consider the contents of Posey's post-trial testimony for any purpose on the merits, and remitted petitioner to post-conviction remedies.

4. Petitioner has thus attempted with diligence to obtain an evidentiary hearing in Florida courts on the question of the efficacy of Posey's courtroom identification as it was affected and influenced by a photographic display conducted in the absence of petitioner's counsel. The effect of the judgment of which review is sought is to make final petitioner's conviction notwithstanding that the case involves substantial federal questions which ought to have been determined but were not determined by Florida courts before entering or affirming the judgment of conviction.

5. The photograph or photographs of petitioner which were displayed to the witness Posey are in the possession of State prosecuting authorities. Since the time of filing the petition for writ of certiorari, petitioner's counsel has attempted in vain, by the process of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, to have those photographs produced for his inspection. The

photographs thus remain in the State's possession and, to this point, beyond discovery and inspection by petitioner's counsel. The absence of petitioner's counsel at the pretrial photographic display was and continues to be critically prejudicial to petitioner, whom Florida has denied an evidentiary hearing except by post-conviction remedies available to those in custody.

6. The absence of petitioner's counsel at the pretrial photographic display was not separately urged to State courts as a ground for excluding Posey's courtroom identification. That ground is relied on as inhering in the ground that was raised, that the impermissibly suggestive photographic display deprived petitioner of a fair trial. *Gilbert* v. *California* (1967), 388 U.S. 263; *United States* v. *Zeiler* (3rd Cir. 1970), 427 F.2d 1305; *Pennsylvania* v. *Whiting* (1970), 439 Pa. 205, 266 A.2d 738, *cert. den.* (November 18, 1970), No. 586, Oct. Term, 1970, 8 Cr.L. 4054.

Respectfully submitted,

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For petitioner

Certificate of Compliance with Rule 58

I, ROBERT P. SMITH, JR., counsel of record for petitioner, do certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to a substantial ground available to petitioner although not previously presented.

ROBERT P. SMITH, JR.
Counsel of record for petitioner

Certificate of Service

I DO CERTIFY that three copies hereof were mailed at Jacksonville, Florida to the Hon. Earl Faircloth, Attorney General of Florida, The Capitol, Tallahassee, Florida, this December 3, 1970.

ROBERT P. SMITH, JR.
Counsel of record for petitioner